

University of Pennsylvania Carey Law School

Penn Carey Law: Legal Scholarship Repository

Faculty Scholarship at Penn Carey Law

7-3-2015

Lost in a Legal Thicket

Paul H. Robinson

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the American Politics Commons, Criminal Law Commons, Criminal Procedure Commons, Criminology and Criminal Justice Commons, Legislation Commons, Policy History, Theory, and Methods Commons, and the Public Policy Commons

Repository Citation

Robinson, Paul H., "Lost in a Legal Thicket" (2015). *Faculty Scholarship at Penn Carey Law*. 1565.
https://scholarship.law.upenn.edu/faculty_scholarship/1565

This Editorial is brought to you for free and open access by Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Carey Law by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

OP-ED

Lost in a legal thicket

By Paul H. Robinson

American criminal codes are a mess, and every year they become more convoluted, more likely to foster injustice. States across the nation are trying to clean up the muddle, but prosecutors often threaten those efforts.

In the 1960s and '70s, three-quarters of the states modernized their criminal laws based on the Model Penal Code of the American Law Institute, simplifying what had been a chaotic collection of overlapping, inconsistent statutes accumulated over the previous century.

Unfortunately, the same political processes that generated the earlier chaos went to work on the new codes. As politicians felt the need to show their constituents that they were "on the job" — doing something, anything, about the crime problem in the day's headlines — they created new, highly specific offenses.

The result is that the coherent criminal codes of 40 and 50 years ago are now horribly degraded. Today's codes can be seven or eight times longer than the original ones without actually covering any new territory.

For example, after a few high-profile cases, politicians felt obliged to create a "carjacking" offense. But did anyone doubt that robbing a driver of his car by force was already a serious crime? Before the new label, prosecutors would have simply charged carjackers with aggravated robbery.

Not only did lawmakers add unnecessary offenses, they failed to integrate them into the existing language. They just layered them on top, creating inconsistencies between the old and the new as well as potential duplicate punishments for the same criminal conduct.

Driven by sensational stories and public outcry, legislators also assigned exceptionally high "grades" to certain offenses that reflected the day's passions rather than research. (The grade sets the terms of punishment, including the maximum term of



NANCY OHANIAN Tribune

U.S. criminal code's 100,000 offenses should be cut to 500.

imprisonment.) An exaggerated grade for one crime sets a new baseline for the next crime du jour, until the whole system is seriously out of whack, and punishments exceed what citizens expect or demand.

The Pennsylvania Legislature, for example, created an offense for reading another person's email without permission, making it a third-degree felony with a maximum sentence of seven years. But a 2010 study, conducted after the law went into effect, showed that residents saw email snooping as a minor infraction.

In New Jersey, growing 15 marijuana plants in your backyard is a crime punishable by a maximum sentence of 10 to 20 years. But residents think such wrongdoing might justify only a six-month sentence.

The will is there to modernize. Key players in the states, such as judges, defense counsel, law enforcement, corrections, parole and probation officials, victims advocates, legislators and others support commissions to revamp their criminal laws.

They see the value in a streamlined, straightforward code that police officers, citizens and offenders can all understand.

Only prosecutors have regularly opposed such change. They benefit from overlapping, duplicative laws because they gain leverage.

It's probably easier to force a plea bargain, for example, when a prosecutor can tell a defendant he's committed several different crimes and could go to prison for decades. But the threat of multiple charges also increases the likelihood of serious injustice.

I was director for criminal law recodification commissions in Illinois and Kentucky. In both instances, prosecution officials who were on the panels and helped shape the proposed code later opposed its enactment, with little explanation. They couldn't say publicly that they wanted to be able to keep overcharging defendants.

As sloppy as the state codes may be, the federal code is much worse, listing an estimated 100,000 offenses. A clean, modern code should have 300 to 500 offenses.

In the 1970s, the "Brown commission," named after its chairman, Edmund G. "Pat" Brown — the father of the current California governor — produced a highly regarded proposal for how to revamp the federal criminal code. This served as a basis for a modernization bill the Senate passed with bipartisan support in 1978. But the Democratic leadership in the House blocked it. Some disagreed with parts of it and probably didn't appreciate the compelling need for change.

Prosecutors who oppose reform seem to care more about winning cases anyway they can than on pursuing justice. But a modern, coherent, consistent criminal code is essential — on the state and the federal level.

PAUL H. ROBINSON is a professor of law at the University of Pennsylvania. He is the author, with Sarah Robinson, of "Pirates, Prisoners, and Lepers: Lessons From Life Outside the Law."